UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

ALTERNATIVE ENTERTAINMENT, INC.,

Respondent, Case No. 07-CA-144404

and

JAMES DECOMMER, an individual,

Charging Party.
_____/

RESPONDENT ALTERNATIVE ENTERTAINMENT, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. STATEMENT OF FACTS

A. The Parties

Respondent, Alternative Entertainment, Inc. ("AEI"), is in the business of installing home entertainment systems for the satellite television provider, Dish Network. (Tr 87) AEI is not owned by, or part of Dish Network. *(Id.)* Instead, it is a subcontractor to Dish Network. *(Id.)* AEI operates throughout the sates of Wisconsin and Michigan and maintains facilities throughout both states. (Tr 118, 210)

The Charging Party, James DeCommer, was employed by AEI as a field technician out of its Byron Center, Michigan facility. (Tr 14) As a field technician, his job was to travel to customers' homes and install the equipment necessary for the Dish Network television systems. He was one of 77 field technicians employed at the Byron Center facility. (Tr 87)

The field technicians at the Byron Center facility fall into two main categories. The COV technicians accomplish their jobs by using company-owned vehicles. (Tr 43) The company supplies the vans they use to carry their tools and equipment and travel from job location to job location throughout the day. The other category is POV, which stands for personal owned vehicles, and as the name suggests, they use their own vehicles to transport tools, equipment and travel from job location to job location. (Tr 43) The majority of the technicians at the Byron Center facility were in the COV category. Mr. DeCommer, however, was in the POV category. (Tr 14)

The base compensation for COVs and POVs is calculated in the same manner. Each type of installation is assigned a number of "units." (Tr 17-18) The COVs and POVs are paid a base dollar amount for each unit completed. (Tr 18) There are other add-ons and bonuses available to the technicians. *(Id.)*

During Mr. DeCommer's employment with AEI, because he was a POV, he received an 82 cent per unit add-on to his base pay to compensate him for the expenses associated with the use of his own vehicle. (Tr 44) In late 2014, AEI announced that it was considering making changes to the way POVs were compensated for use of their vehicles. (Tr 22, R-8) Specifically, AEI announced its intention to change how POVs were compensated for the use of their vehicles. Instead of compensating them at the 82 cent per unit rate, the plan was to begin paying them for actual mileage incurred on their vehicles during the performance of their duties. *(Id.)*

B. <u>The Alleged Protected Activity</u>

The complaint alleges that Mr. DeCommer engaged in protected concerted activity on three occasions. Specifically, paragraph 6 alleges:

> "About December 10, 12, and 16, 2014, Respondent's employees including the Charging Party, concertedly complained to Respondent regarding the wages, hours and working conditions of Respondent's employees, by discussing Respondent's policies for employees who utilized privately-owned vehicles on Respondent's behalf and regarding the compensation of certain employees."

In fact, even based on Mr. DeCommer's description, he was the only one complaining, and there was nothing concerted about his complaints.

Mr. DeCommer testified that he had a conversation on December 10, 2014 with Rob Robinson. (Tr 29) Mr. Robinson is the Regional Manager for AEI and he has responsibility for the field technicians throughout the states of Michigan and Wisconsin. (Tr 117) Here is Mr. DeCommer's description of the December 10th conversation with Mr. Robinson:

> A. Yeah, yep. But there was also the discussion before that that Mr. Robinson had confirmed that it was going through and that it was going to be based off of the mileage from your first job to the last job.
>
> Q. Okay.

A. So if we were working in an area that was 50 miles from our house, we wouldn't be compensated for mileage driving to that area or from that area, only from our first to last job.

Q. Okay. And you said that was a previous conversation that you had.

A. Yeah.

Q. And do you remember when in relation to this December 12th conversation you had that conversation with Mr. Robinson?

A. I don't remember the date. It was somewhere between the 5th and the 12th.

Q. Okay.

A. It might have been the 10th.

(Tr 29)

Thus, Mr. DeCommer's own testimony confirms that the only two people involved in the December 10th conversation were himself and Mr. Robinson. There were no other employees involved in that conversation. It also confirms that there was no complaint made. The entire conversation, as Mr. DeCommer described, was that Mr. Robinson explained to him how the new policy would work.

Mr. DeCommer's description of the December 12th conversation similarly confirms that there were no other employees involved. Again, the only two people involved in the conversation were Mr. DeCommer and Mr. Robinson. Here is Mr. DeCommer's description of that conversation:

A. I told him that I thought that it was unfair that this pay scale was going through; that they were expecting us to pay for our own expenses; that they would expect us to pay more than what the COVs would make -- would be compensated if they were driving their own vehicle.

(Tr 28)

The third discussion alleged to constitute protected concerted activity occurred on December 16, 2014. On that date, Mr. DeCommer participated in a telephone conference with Neal Maccoux, AEI's Chief Financial Officer. (Tr 31) Mr. Maccoux had run examples of how the new policy would affect Mr. DeCommer's pay and provided those numbers to Mr. DeCommer. (Tr 32) Mr. DeCommer was concerned with the accuracy of those numbers so Mr. Robinson suggested a telephone conference between Mr. DeCommer and Mr. Maccoux. (Tr 30) The telephone conference took place on the morning of December 16. *(Id.)* Participating on one end of the phone line were Victor Humphreys, the Manager of the Byron Center facility, and Mr. DeCommer. On the other end of the line was Mr. Maccoux. *(Id.)* Here is Mr. DeCommer's description of the conversation during that telephone conference:

> A. Neal had asked me if there was any concerns that I had. I said, yeah, I believe that the compensation package isn't going to adequately compensate us for what we are doing. And he come back with that we were being -- or the Company felt we were being overpaid. I said, that may be the case, but based on what you're telling us what you're going to do, you're going to grossly underpay us. For me personally, I'm going to lose anywhere from 7 to 10 thousand dollars of my pay, and then I'm going to have to come out of pocket to cover the other expenses that you would otherwise be paying for your own vehicles to be driven.
>
> Q. Did you during that conversation bring up any information that you learned from other employees or what you understood the --
>
> A. Yep. I told him that I talked with other employees and that they had done their own figures and found that they would lose quite a bit of money as well if this change were to go through.
>
> Q. Did he have any response to that?
>
> A. He said that it's not the Company's intention to cause us to lose money, that the figures that he'd come up with were accurate. And I told him, look, I've gone over all the figures. I sat with Mr. Humphreys, and we looked at some of the figures that you sent over to him for October. One day alone, your figures were claiming I drove 178 miles from my first to last job, which was way over what it should have been.

(Tr 31-32)

Thus, again, based on Mr. DeCommer's own testimony, there were no other employees involved in this conversation. He does claim that during his conversation he told Mr. Maccoux that he had spoken to other employees who also thought that they would lose money. However, there is no testimony in the record about who these employees are. There is no testimony in the record to the effect that Mr. DeCommer actually had these conversations. His testimony was that he said he did. There is no testimony in the record that any other employees had authorized, suggested or were even aware that Mr. DeCommer was going to have this telephone conference.

There were two documents that were offered by the General Counsel and admitted into evidence which further demonstrate the lack of any concerted character to Mr. DeCommer discussion with management. The first is the text message of December 5, 2014 admitted as GC-4. That is a text message Mr. DeCommer sent to Mr. Robinson. The entire text is Mr. DeCommer's description of how much money he will lose as a result of the mileage change. It is absolutely devoid of any mention of his purported concern for others, nor is there anything in this message which would indicate Mr. DeCommer was acting on behalf of others:

> So I just calculated the difference in pay since ***my*** last oil change October 9th. At .82 unit ***I*** made 3269.34 not counting overtime and that would have placed an additional 327.00 into my 401K. If ***my*** POV pay is based on mileage I would have only been compensated 1682.75 assuming about a .53 reimbursement. [That's] a 1600 dollar drop in pay in just under 2 months...times that by 6 and [that's] a 9500 dollar reimbursement cut not counting any additional overtime or lost 401K [contribution]...so very conservatively, ***[I'm]*** looking [at least] a 10,000 pay cut next year...[that's] an impossible pill to swallow.

(GC-4, Emphasis added.)

The second is Mr. DeCommer's e-mail to Tom Burgess, the President of AEI. It was admitted as General Counsel's Exhibit 5. That e-mail was dated December 16, 2014. The first part of the e-mail is Mr. DeCommer's arguments about why the company should "move heaven

and earth to get James DeCommer in a position to run operations ...". The next part of the e-mail presents general calculations by which Mr. DeCommer demonstrates how ***he*** believes ***he*** will lose money under the new plan. The last part of the e-mail is Mr. DeCommer's threat that he will quit his job and move out of state if the policy goes into effect.[1] There is not even a suggestion in the record that any other employee was in any way involved in the text or the e-mail.

C. <u>The ALJ's Departure From The Complaint To Find The Discharge Unlawful</u>

The ALJ found that Mr. DeCommer's discharge was unlawful. He made that finding based on a theory that was never alleged in the complaint. As stated, paragraph 6 of the complaint alleges as follows:

> About December 10, 12, and 16, 2014, Respondent's employees, including the charging party, concertedly complained to Respondent concerning the wages, hours, and working conditions of Respondent's employees, by discussing the Respondent's policies for employees who utilized privately owned vehicles on Respondent's behalf and regarding the compensation of certain employees.

(GC-1(e))

At paragraph 8, the complaint alleges that Mr. DeCommer was discharged for engaging in the conduct described in paragraph 6. Thus, the theory specifically alleged in the complaint is very plain: That Mr. DeCommer engaged in concerted activity by complaining to his employer about the pay change, and that he was discharged for engaging in that activity. Indeed, the complaint specifically identifies the three dates that the complaints were made, and those three dates are identical to the three conversations Mr. DeCommer testified to, and which are

[1] GC-4 and GC-5 are discussed here only because they evidence the non-concerted nature of Mr. DeCommer's overall complaints about the policy. If the General Counsel argues that they constitute part of the protected concerted activity, AEI would object. The complaint is clear that the only alleged protected concerted activity were discussions that occurred on December 10, 12 and 16. These two documents do not meet that description, and thus were never even alleged as protected converted activity

described above. These were all conversations between Mr. DeCommer and employer representatives.

The ALJ, however, articulates an entirely different theory in finding the discharge to be unlawful. He first articulated this new theory at page 1 where he characterizes the complaint as alleging that AEI acted unlawfully by "(2) discharging DeCommer because he defied company managers and continued speaking with co-workers about these changes." There is no such allegation in the complaint. The complaint alleges that Mr. DeCommer was discharged because he made complaints to his employer, not because he spoke with his co-workers. That the ALJ's decision that the DeCommer discharge was unlawful is based on his theory and not the theory stated in the complaint as shown by his *Conclusion of Law II* which states:

> "By discharging James DeCommer for objecting to changes in the terms and conditions of his employment and discussing his concerns with his co-workers, the company violated Section 8(a)(1) of the Act."

(ALJ D., p. 12)

Even in supporting this new theory, the ALJ relies on factual determinations that are not in any way supported by the record. Thus, on page 4 of his decision, the ALJ states:

> "Thereafter, DeCommer frequently shared with Humphreys and Robinson the concerns of POV field technicians that the new transportation compensation formula would decrease their compensation."

To support this assertion, the ALJ cites to transcript pages 21-23, 115-116, 120 and to General Counsel's Exhibit 6 at page 2. There is nothing on any of those pages or in that exhibit which supports this assertion about Mr. DeCommer frequently sharing the concerns about other POVs. There is not anything in the record that supports that assertion. As discussed above, Mr. DeCommer's complaints were always about how much money ***he*** was going to make.

To make his new theory work, the ALJ, of course, would have to show that the company knew that Mr. DeCommer was discussing his complaints with his co-workers. The ALJ readily admits:

> "There is no direct evidence that Humphreys and/or Robinson knew that DeCommer continued discussing POV compensation issues with co-workers …."

(ALJ D., p. 10)

However, what the ALJ does with this is claim that manager Rob Robinson demonstrated his knowledge of Mr. DeCommer's discussion with co-workers with the following statement:

> "Management knew of his concerted activities because Robinson pulled DeCommer aside and instructed him to **stop sharing his wage concerns with co-workers.**" (Emphasis added.)

(ALJ D., p. 10)

While AEI denies that any such conversation took place, even Mr. DeCommer's testimony does not support the conversation the way the ALJ described it here. Specifically, Mr. DeCommer never claimed that Mr. Robinson said to "stop" sharing concerns. Here is Mr. DeCommer's description:

> "So he brought me outside, and it was at that point that Mr. Robinson told me that I don't want you talking to any of the other technicians about this; if you have any concerns or questions, I want you to direct them to myself or Mr. Humphreys."

(*Id.* at p. 28)

Of course, by adding the word "stop" to Mr. DeCommer's description, it creates the impression that Mr. Robinson would have known the discussions were taking place. Obviously, one does not tell one to stop something unless one thinks it has been or is occurring. However, while the use of the word "stop" has no support in the record, its addition by the ALJ is critical to

his rationale. Thus, when the case is evaluated against the real record rather than this addition, even the ALJ's theory unravels.

D. The Reason For Mr. DeCommer's Discharge

Mr. DeCommer was discharged on December 18, 2015. However, the concerns he raised about the new mileage policy had nothing to do with the decision to terminate him. Instead, he was discharged because he refused to do a required part of the job, smart home sales.

Every field technician that works at AEI is expected to do some selling to the customers for whom they are doing installations. Specifically, they are required to sell additional services to those customers connected with the installations, such as mounting a television on a wall. (Tr 45) These additional service items are referred to as smart home sales. *(Id.)* Mr. DeCommer was fully aware of the smart home sales requirement because AEI regularly publicized the expectations to field technicians. (Tr 46)

The companywide minimum for smart home sales was $6.00 per installation. (Tr 11l) However, the smart home sales minimum for the Byron Center facility was $10.00 per installation. (Tr 94) Thus, field technicians were required to average at least $10.00 in smart home sales per installation. It was vital to all of the field technicians that everyone meets these standards. (Tr 112) The field technicians can expect additional bonus payments if certain metrics are met. *(Id.)* Of course, those bonus payments would be higher depending on the level of performance demonstrated by the metrics. One of the critical metrics is the facility's ability to maintain the minimum smart home sales on a facility-wide basis. If the facility fell short, then all of the technicians would lose money. *(Id.)* Thus, it was imperative for everyone to pull their weight.

General Counsel's Exhibit 8 is a printout of the smart home sales records maintained by AEI for the employees who work out of the Byron Center facility. (Tr 88) Each field technician

has an employee number. Mr. DeCommer's number was 0639. (Tr 90) General Counsel's Exhibit 8 shows smart home sales by work order. Prior to November 2014, Mr. DeCommer was a high achiever in the smart home sales category. In fact, in October 2014, he averaged approximately $80.00 per installation. (Tr 48) Then his sales plummeted. For November and December, 2014, Mr. DeCommer's smart home sales were as follows:

Week ending 11/7/2014	$4.13
Week ending 11/14/2014	$.41
Week ending 11/21/2014	$1.71
Week ending 11/28/2014	$6.35
Week ending 12/5/2014	$8.25
Week ending 12/12/2014	$0.00

(Tr 90-92; GC-8)

As Mr. Humphreys testified, he gets regular e-mail updates on employees' smart home sales statistics. (Tr 89-90) They come a few days after the fact. Mr. Humphreys evaluates the smart home sales on a rolling one-month "look back". (Tr 93) By December, 2014, Mr. DeCommer was showing a negative trend. (Tr 94) He went from $80 smart home sales to almost none and he was sustaining the very low level for over a month. Thus, on December 17, after receiving the update which showed smart home sales for December 12 as zero, Mr. Humphreys had a talk with Mr. DeCommer. (Tr 96) Mr. DeCommer said that he was refusing to do smart home sales, and that he was talking people out of smart home sales. *(Id.)* During the conversation, Mr. Humphreys stated several times that Mr. DeCommer had to do smart home sales, and Mr. DeCommer stated several times that he was refusing. *(Id.)* Mr. Humphreys reported this to his boss, Mr. Robinson, and Mr. Robinson approved Mr. DeCommer for discharge. (Tr 97-98) Thus, Mr. DeCommer was not discharged because he questioned the compensation change. He was not discharged because he had low smart home sales. He was discharged because he said he would not do those sales. The ALJ ignores the fact that Mr.

DeCommer refused to do a critical part of his job over a period of months. Mr. DeCommer did not simply need more time to learn his job, nor was he having difficulty performing his job. He made a deliberate decision to stop performing what he knew was a crucial part of his job. That type of conduct is not conduct that will improve if given additional training time.

The ALJ concludes, based solely on Mr. DeCommer's testimony that he discussed his concerns with coworkers, coworkers who were never called as witnesses, who never were identified in the record, that the "timing of Robinson's unlawfully coercive admonition provides strong circumstantial evidence" of a discriminatory motive." (ALJ D., p. 10.)

Mr. DeCommer was not the only field technician terminated for this reason within this time frame. General Counsel Exhibit 13 is comprised of the termination notices for the following three field technicians:

Employee	**Termination Date**
Greg Berhns	1/14/2015
Toby Frazier	12/4/2014
Ryan Meyers	1/24/2015

Mr. Berhns and Mr. Meyers both refused to do Smart Homes Sales and were discharged. Mr. Frazier also refused. He quit before he could be fired. (Tr 100-103)

E. Employees Were Not Prohibited From Discussing The Terms And Conditions Of Employment

Paragraph 9 of the complaint alleges that on September 12 Mr. Robinson "prohibited Respondent's employees from discussing the terms and conditions of employment with fellow employees." In fact, only Mr. DeCommer was involved. There were no other "employees". Mr. DeCommer's description of events was that on the morning of December 12, 2014 when he asked Mr. Robinson about the pay change, "Mr. Robinson told me that I don't want you talking to any of the other technicians about this; if you have concerns or questions, I want you to direct them to myself or Mr. Humphreys." (Tr 28)

Mr. Robinson denies that he ever told Mr. DeCommer not to talk to employees, or anyone else, about his concerns. (Tr 122-123) According to Mr. Robinson, he was encouraging employees to talk about the plan because in December 2014, it was only in a conceptual stage and AEI was interested in getting everyone's perspective. *(Id.)* One thing that Mr. Robinson and Mr. DeCommer agree about in the December 12th conversation is that during that conversation Mr. Robinson was the one who suggested that Mr. DeCommer teleconference with the CFO, Mr. Maccoux, that was eventually arranged. (Tr 123)

F. Confidentiality Rules And Class Waiver

General Counsel's Exhibit 2 is a copy of AEI's employee's handbook. The work rules are provided at page 27. At page 28, the following items are identified as prohibited conduct:

- Unauthorized disclosure of business secrets or confidential business or customer information including any compensation or employee salary information.
- Unauthorized disclosure of personnel data (including any salary information).

There was no evidence presented to suggest that any employee was ever disciplined for violation of these rules, nor was there any evidence presented as to what type of disclosure would be "unauthorized."

The AEI "Open Door Policy and Arbitration Program" was admitted as General Counsel's Exhibit 3. In fact, employees are required to sign that document as a condition of employment. Under the subtitle "What Rights Do I and AEI Waive Under This Agreement?" is the following language:

> "By signing this agreement, you and the Company give up the same important rights, such as filing or maintaining a lawsuit in court, joining or participating in a class action, or representative action, acting as a representative of others, having a jury decide a claim ...".

II. SPECIFICATION OF QUESTIONS INVOLVED

1. Whether the ALJ's finding that AEI violated Section 8(a)(1) when it discharged Mr. DeCommer is both legally and factually deficient?

   (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27)

2. Whether the ALJ's finding that AEI violated Section 8(a)(1) when it implemented a confidentiality clause is both legally and factually deficient?

   (Exceptions 10)

3. Whether the ALJ's finding that AEI violated Section 8(a)(1) when it implemented the class action waiver is both legally and factually deficient?

   (Exceptions 11, 25, 26, 27)

4. Whether the ALJ incorrectly found that AEI prohibited DeCommer from speaking with his co-workers?

   (Exceptions 12, 13, 15, 17, 25, 26, 27)

III. ARGUMENT

A. The ALJ Erred In Finding DeCommer's Discharge To Be Unlawful

1. The ALJ's Theory Is Not Part Of The Complaint And Not Supported By The Evidence

The ALJ's finding that DeCommer was unlawfully discharged for complaining amongst his co-workers cannot stand because it was never alleged in the complaint.

Both the Administrative Procedures Act and the Board's own rules require that a complaint properly inform the charged party of any asserted violation. 5 USC § 544(b)(iii); 29 CFR § 102.15. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *George Banta Co v NLRB*, 222 U.S. App DC 288, 686 F2d 10, 17 (DC Cir. 1982). For example, in *United Parcel Service, Inc. v NLRB*, 706 F2d 972 (3rd Cir. 1983), the court described the general legal requirements.

> Even where evidence supporting a remedial order is in the record, courts have refused to grant enforcement of a Board order in the absence of either a supporting allegation of a complaint, or a meaningful opportunity to litigate the underlying issue for the ALJ. See, e.g., *Blake*, 663 F2d at 279*; Montgomery Ward Co. v NLRB*, 385 F2d 760, 763-64 (8th Cir. 1967).

Id. at 978.

In this case, of course, there was not a charge and there was no allegation or complaint concerning any communication with DeCommer's coworkers.

Here, the complaint alleges one theory and one theory only – that Mr. DeCommer was illegally discharged for complaining to management. Thus, there can be no finding of a violation based on the ALJ's new theory.

Even if it had been alleged that Mr. DeCommer was discharged for discussions with his co-workers, there would still be no support for the ALJ's finding. Necessary to any such theory would be evidence that those who made the discharge decision knew of the discussions. The ALJ supplies this element with his re-characterization of DeCommer's testimony. Remember, the ALJ said that Manager Rob Robinson told DeCommer to "stop" discussing the topic with co-workers, thus indicating knowledge that the discussion took place. As discussed above, there is nothing in the record to support any finding that the word "stop" was used. The only one who used the word "stop" was the ALJ.

B. The Discharge Cannot Be Held Unlawful Under The Theory Stated In The Complaint Because Mr. DeCommer Did Not Engage In Concerted Activity

DeCommer's own testimony establishes that he did not engage in protected concerted activity. Of course, the analytical framework for evaluating whether conduct constitutes protected concerted activity was announced by the Board in *Meyers Indust., Inc.,* 268 NLRB 493 (1984) *(Meyers I*), and further explained at *Meyers Indust., Inc.*, 281 NLRB 882 (1986) *(Meyers II*). In *Meyers I* and *II*, the charging party had been discharged when he refused to drive his truck

for safety concerns and reported the safety issues to a governmental agency. The Board recognized that part and parcel of finding employee activity to be protected concerted is finding that it be concerted. In defining what constitutes concerted activity, the Board stated that it would rely on an "objective standard" and held "in general, to find an employee's activity to be `concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I* at 497. Thus applying that standard, the Board held that conduct at issue was not concerted because the employee had acted entirely on his own in refusing to drive his truck and making his complaint.

Simply by reference to the definition announced in *Meyers I*, it cannot be held that any of the three discussions alleged in the complaint, the discussions of December 10, 12 and 16, 2014, constituted concerted activity. It is undisputably established by Mr. DeCommer's own testimony that no other employees were involved in those discussions. Thus, he did not engage in those discussions "with" any other employees. There is no evidence in the record to support any contention that any other employees knew about the discussions or were consulted about the discussions or in any way offered their authority or support for Mr. DeCommer to engage in those discussions. Thus, again, with reference solely to the standard announced by the Board in *Meyers I* and Mr. DeCommer's own testimony about each of the discussions at issue, the required holding in this case is that he did not engage in concerted activity.

A case the Board relied upon in announcing its decision in *Meyers I* is helpful to the analysis here. The Board cited favorably to *Continental Manufacturing*, 155 NLRB 255 (1965). In that case, the employee had drafted and signed a letter to her employer which stated that a majority of employees were disgusted with certain terms and conditions of employment. The letter stated "we all want to continue working here and with you; please help us to improve our working conditions." The Board held that the conduct was not concerted because even though it

was phrased in terms of being on behalf of other employees, the fact was that there was no evidence that any other employees had been consulted about or were involved in the drafting of the letter.

> "She did not consult with any other employees, or the union about the grievances therein stated or her intention of sending the letter ... There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees. This letter received no support from union representatives."

Id. at 257.

Here, we have a complaint that alleges that Mr. DeCommer engaged in three separate discussions, each of which constituted protected concerted activity. But then we have the testimony from Mr. DeCommer himself that shows that from the text message he sent on December 5, 2014 through the e-mail that he sent on December 16, 2014, and the three conversations that are subject to the complaint that occurred in between, his only concern was for his own paycheck. Mr. DeCommer was concerned about how much money he would make; he expressed his concern about how much money he might lose; and he threatened to quit if he did not get paid the way he thought he should. In all of the testimony, there is not one word from which it can be discerned that any other employee was involved in these complaints and discussions, that any other employee was aware Mr. DeCommer was making them, or that any other employee in any way authorized or even acquiesced in Mr. DeCommer's communication with his employer about the paycheck. The three discussions that are the subject of this complaint were not concerted and, for that reason, the allegation that the company violated Section 8(a)(1) of the Act by discharging DeCommer for engaging in them should be dismissed.

The cases in which the Board has held a complaint by a single employee was concerted are also helpful to the analysis. In all of those cases, there invariably are facts which distinguish

them from this case, and thus serve to further illustrate that there was no concerted activity here. For instance, in *Whittaker Corp.*, 289 NLRB 933 (1988), the employer had convened a group meeting of employees to announce that they would not be receiving wage increases. The charging party, in the presence of all the other employees, spoke up at the meeting and protested the lack of the wage increase. The Board found the conduct to be concerted, but only because the employee raised the objection in front of the congregated employees with an obvious purpose of enlisting the support of his co-workers.

> "Here, the Respondent's president called together the employees to announce that their anticipated wage increases would not be forthcoming. As these meetings provided the employees with their first knowledge of the Respondent's decision to suspend the wage increases, they were also the employees' first opportunity to comment on or protest that action. Johnston, not having had a chance to meet with any employee beforehand, made his statements as a spontaneous reaction to the Respondent's announcement. He phrased his remarks not as a personal complaint, but in terms of `us' and 'we.' Obviously, they were addressed to everyone assembled to discuss the topic of the proposed wage increase suspension, including his fellow employees. His statements implicitly elicited support from his fellow employees against the announced change."

(Id. at 934.)

The court found the comments to be concerted because they were "the initiation of group action in the presence of other employees." *(Id.)* Of course, in this case, it is undisputed that Mr. DeCommer's comments on December 10, 12, and 16 were not made in the presence of any other employees. They were in no sense a call to group action.

In *Champion Homebuilders Co.*, 343 NLRB 671 (2004), the employee was discharged for writing a letter. The Board held that the letter constituted concerted activity but only because the charging party had:

> "discussed his concerns about bonuses with coworkers on several occasions, and that some of his fellow employees agreed and encouraged him to bring the matter up at a safety meeting."

(Id. at 673.)

In this case, there is no evidence of any similar discussions and no evidence of any similar encouragement by co-workers.

In *Salon/Spa at Boro,* 356 NLRB No. 69 (2010), the complaints to management were held to be concerted because, under circumstances which the ALJ characterized as reaching the "outer limit" of concertedness, the employees made complaints to management after "raising specific grievances with their co-workers and seeking their support and approval." *(Id.* at 57.) Again, in this case, there is nothing in the record from which any similar concerted conduct can be discerned.

In *Every Woman's Place, Inc.,* 282 NLRB 413 (1986), the Board found that an employee's telephone call to the U.S. Department of Wage and Hour Division constituted protected concerted activity because the purpose of the call was to follow up on a complaint that "she and two other co-workers had jointly made." *(Id.)* There is no evidence of any joint complaints in this case.

In *Hitachi Capital America Corp.,* 361 NLRB No. 12 (2014), the charging party was disciplined for writing e-mails critical of an inclement weather policy change. The Board found the e-mails to be concerted but only because before she wrote them, the charging party and two co-workers were all together complaining about the policy and she said in their presence, "I'm going to ask," and then sat down and wrote the e-mails. Again, there is no evidence of any similar involvement by any other employees here in any of the three discussions with management alleged to be concerted.

In *Nova Health System*, 360 NLRB No. 135 (2014), the Board held that an e-mail which one employee sent protesting certain working conditions was concerted activity but only because before she sent it she had conferred with her co-workers and they all agreed that she would send it on their behalf. (*Id.* at 19.)

Of course, to establish a violation based on some adverse employment action, General Counsel has the initial burden of showing that protected activity was the motivating factor for the action. *Wright Line*, 251 NLRB 1083 (1980). The General Counsel's burden is to prove the existence of protected activity, the employer's knowledge of that activity, and animus. *Donald Bros. Redimix, Inc.*, 241 NLRB 958, 961 (2004).

In this case, the General Counsel has failed to show any evidence to support any element of the initial burden. As discussed above, there was no protected activity because Mr. DeCommer did not act in concert with anyone. Since there was no concerted activity, the employer could not have knowledge of it, and there is no evidence in this record from which it could be even remotely discerned that AEI had any animus against Mr. DeCommer's questioning the pay policy. In fact, Rob Robinson's testimony was that the Company encouraged the discussion. The e-mail from Neal Maccoux dated December 15, 2014, to all of the field technicians announcing the policy ends with this, "If you have any questions, please e-mail me or call the number listed below." (R-8) AEI arranged for Mr. DeCommer to have a telephone conference with the Chief Financial Officer to make it easier for Mr. DeCommer to raise and discuss his issues about the change in mileage compensation.

The discharge portion of the complaint is not only subject to dismissal because the General Counsel failed to meet the burden establishing concerted activity, it is also subject to dismissal because Mr. DeCommer's discussions about the new mileage policy were not the basis

for his discharge. As discussed in detail above, he was discharged just like two other employees at about the same time (and a third who quit before he was going to be fired). Mr. DeCommer was fired because he communicated to his supervisor his refusal to perform smart home sales.

C. <u>Rob Robinson Did Not Prohibit Employees From Discussing The Terms And Conditions Of Employment</u>

The allegation at paragraph 19 of the complaint is that on December 12, 2014, Rob Robinson, at the Byron Center facility, "orally prohibited employees from discussing the terms and conditions of employment with fellow employees." Of course, Mr. DeCommer's testimony differs from Mr. Robinson's on this point. Mr. DeCommer's testimony starts on page 27 of the transcript and begins with the phrase, "If I remember right ...". Then his description of the relevant portion of the conversation with Mr. Robinson relevant to this allegation is:

> "And he said why don't we talk outside, because there were some other technicians in the general office area. So he brought me outside, and it was at that point that Mr. Robinson told me that I don't want you talking to any of the other technicians about this. If you have any concerns or questions, I want you to direct them to myself or Mr. Humphreys."

Mr. DeCommer was then asked:

> "And did you have any response to that?"

And here is his answer:

> "I told him that I thought that it was unfair that the pay scale was going through; that they were expecting us to pay for our own expenses; that they would expect us to pay more than what the COVs would make — would be compensated if they would drive their own vehicle."

(5/19/2015 Tr, p. 28)

Thus, according to Mr. DeCommer, "if [he] remembers right" after he was supposedly prohibited from talking to other employees about the mileage change, he never raised any

objection to that prohibition at all. Instead, he launched right into his complaints about how he was going to be paid. This suggests one of two things, or perhaps both:

1. That there never really was any prohibition as alleged; or

2. That Mr. DeCommer was not too much concerned about discussing this with other employees because as described above, his complaints and concerns were about his paycheck, not theirs.

Mr. Robinson was sure that he "remembered right" and that he did not make any such prohibition. Mr. Robinson's description was only that he tried to assure Mr. DeCommer that the company was not intending to cut anyone's pay and remind Mr. DeCommer that he could discuss his concerns with the company's CFO. A point on which Mr. DeCommer agrees.

D. <u>The Rules And Class Waiver Are Not Unlawful</u>

AEI understand that under the Board's current view, the confidentiality rules and the class waiver provisions at issue here is that they are violative of Section 8(a)(1) of the Act.

However, to preserve its right to appeal AEI states its position that the confidentiality rules are not unlawful because they are not facially unlawful and there has been no showing that they have ever been applied in any way that violates Section 7 rights. The waiver provisions of the arbitration agreement are not unlawful for the reasons stated in the decisions of the United States Court of Appeals such as *D.R. Horton v NLRB,* 737 F.3d 344 (5th Cir. 2013); *Sutherland v Ernst & Young,* 726 F.3d 290 (2nd Cir. 2013); *Owen v Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

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Dated: August 6, 2015

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CERTIFICATE OF SERVICE

The undersigned affirms that on August 6, 2015, *Respondent's Exceptions to Administrative Law Judge's Decision and its Brief in Support of Exceptions* were filed with the Division of Judges through the Board's e-filing system and that copies were served on the following individuals by electronic mail to the addresses set forth below:

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